Electronic Employment Eligibility Verification

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Summary

The 113th Congress is expected to take up comprehensive immigration reform. Some of the most difficult immigration policy questions on the table concern unauthorized immigration and unauthorized employment. Today's discussions about these issues build on the work of prior Congresses. In 1986, following many years of debate about unauthorized immigration to the United States, Congress enacted the Immigration Reform and Control Act (IRCA). This law sought to address unauthorized immigration, in part, by requiring all employers to examine documents presented by new hires to verify identity and work authorization and to complete and retain employment eligibility verification (I-9) forms. Ten years later, in the face of a growing illegal alien population, Congress attempted to strengthen the employment verification process by establishing pilot programs for electronic verification, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).

The Basic Pilot program (known now as E-Verify), the first of the three IIRIRA employment verification pilots to be implemented and the only one still in operation, began in November 1997. Originally scheduled to terminate in November 2001, it has been extended several times. It is currently authorized until September 30, 2015, in accordance with P.L. 112-176.

E-Verify is administered by the Department of Homeland Security's U.S. Citizenship and Immigration Services (DHS/USCIS). The program has been growing in recent years. On February 16, 2013, there were 432,256 employers enrolled in E-Verify, representing more than 1,300,000 hiring sites. E-Verify is a primarily voluntary program, but there are some mandatory participation requirements. Among them is a rule, which became effective on September 8, 2009, requiring certain federal contracts to contain a new clause committing contractors to use E-Verify.

Under E-Verify, participating employers submit information about their new hires (name, date of birth, Social Security number, immigration/citizenship status, and alien number, if applicable) from the I-9 form. This information is automatically compared with information in Social Security Administration and, if necessary, DHS databases to verify identity and employment eligibility.

Legislation on electronic employment eligibility verification may be considered in the 113th Congress as part of a comprehensive immigration reform bill or as separate, stand-alone legislation. In weighing proposals on electronic employment verification, Congress may find it useful to evaluate them in terms of their potential impact on a set of related issues: unauthorized employment; verification system accuracy, efficiency, and capacity; discrimination; employer compliance; privacy; and verification system usability and employer burden.

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Background

Many years of debate about unauthorized immigration to the United States culminated in the enactment of the Immigration Reform and Control Act (IRCA) of 1986.[1] That year, there were an estimated 3.2 million unauthorized immigrants (illegal aliens) in the country.[2] IRCA coupled legalization programs for certain segments of the unauthorized population with provisions to deter future unauthorized immigration by reducing the magnet of employment. These latter provisions reflected a belief, widely held then and now, that most unauthorized aliens enter and remain in the United States in order to work. To reduce the job magnet, IRCA amended the Immigration and Nationality Act (INA)[3] to add a new §274A, which makes it unlawful to knowingly hire, recruit, or refer for a fee, or continue to employ, an unauthorized alien, and requires all employers to examine documents presented by new hires to verify identity and work authorization and to complete and retain employment eligibility verification (I-9) forms. These INA §274A provisions are sometimes referred to collectively as *employer sanctions*.

The IRCA provisions did not have the effect of curtailing future illegal immigration. After falling to an estimated 1.9 million in 1988 as eligible unauthorized aliens legalized their status, the unauthorized population began to grow. By the early 1990s, it had surpassed pre-IRCA levels.[4] The I-9 process was effectively undermined by the ready availability of genuine-looking fraudulent documents. The challenge that document fraud continues to pose to the I-9 system was discussed in a 2009 report prepared for the Department of Homeland Security (DHS):

> [T]he likelihood of employers detecting counterfeit documents depends on the quality of the documents, the employers' familiarity with immigration and other documents, and their expertise in detecting fraudulent documents. The U.S. Department of Homeland Security (DHS) expects employers to exercise reasonable diligence in reviewing documents but does not expect them to be experts or to question reasonable-appearing documents.[5]

Ten years after the enactment of IRCA, Congress attempted to strengthen the employment verification process as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[6] IIRIRA directed the Attorney General to conduct three largely voluntary pilot programs for electronic employment eligibility confirmation. After examining documents and completing I-9 forms as required under INA §274A,[7] employers participating in a pilot program would seek to confirm the identity and employment eligibility of their new hires. IIRIRA tasked the Attorney General with establishing a confirmation system to respond to inquiries made by participants in these pilot programs "at any time through a toll-free telephone line or other toll-free electronic media concerning an individual's identity and whether the individual is authorized to be employed." The former Immigration and Naturalization Service (INS) within the U.S.

[1] P.L. 99-603, November 6, 1986.

[2] CRS Report RL33874, *Unauthorized Aliens Residing in the United States: Estimates Since 1986*, by Ruth Ellen Wasem, p. 2 (hereinafter cited as CRS Report RL33874).

[3] Act of June 27, 1952, ch. 477, as amended. The INA is the basis of current immigration law.

[4] CRS Report RL33874, pp. 2-3.

[5] Westat, *Findings of the E-Verify Program Evaluation*, December 2009, p. 131 (hereinafter cited as Westat Report, December 2009).

[6] Division C of P.L. 104-208, September 30, 1996.

[7] IIRIRA modified the I-9 requirements for pilot program participants.

Department of Justice (DOJ) had initial responsibility for administering the employment eligibility confirmation pilot programs. In 2003, DHS assumed this responsibility.[8]

E-Verify

The Basic Pilot program, the first of the three IIRIRA employment verification pilots to be implemented and the only one still in operation, began in November 1997 in the five states with the largest unauthorized alien populations at the time.[9] In December 2004, in accordance with P.L. 108-156, the program became available nationwide, although it remained primarily voluntary. The Basic Pilot program has changed over the years. Since July 2005, it has been entirely Internet-based. It is administered by DHS's U.S. Citizenship and Immigration Services (USCIS).

The Basic Pilot Program was briefly renamed the Employment Eligibility Verification (EEV) Program by the Administration of George W. Bush, and was again renamed E-Verify by that Administration in August 2007.[10] IIRIRA, as originally enacted, directed the Attorney General to terminate the Basic Pilot program four years after going into effect, unless Congress provided otherwise. Congress has extended the life of the Basic Pilot program/E-Verify several times. Most recently, it extended E-Verify until September 30, 2015, as part of P.L. 112-176.[11]

Verification Process

As part of the I-9 process, all employers must review documents presented by new hires to verify their identity and employment authorization and, along with the new hires, must complete I-9 forms. Employers participating in E-Verify then must submit information from the I-9 form about their new hires (name, date of birth, Social Security number, immigration/citizenship status, and alien number, if applicable) via the Internet for confirmation.

The information in the employer's query is automatically compared with information in SSA's primary database, the Numerical Identification File (Numident), which contains records of individuals issued Social Security numbers. For those employees identifying themselves as citizens, if the information submitted by the employer matches the information in Numident and

[8] The Homeland Security Act of 2002 (P.L. 107-296, November 25, 2002) abolished INS and transferred most of its functions to DHS as of March 1, 2003. P.L. 108-156 (December 3, 2003) amended IIRIRA to transfer responsibility for the pilot programs from the Attorney General to the Secretary of Homeland Security.

[9] The original Basic Pilot states were California, Florida, Illinois, New York, and Texas. The other two IIRIRA pilot programs—the Machine-Readable Document Pilot (MRDP) and the Citizen Attestation Verification Pilot (CAVP)—were terminated in 2003.

[10] The IIRIRA provisions were never amended to reflect these name changes, however. In this report, "E-Verify" is used to refer to the program generally, and "Basic Pilot" is used at times to refer to the program prior to the August 2007 E-Verify name change.

[11] P.L. 112-176, September 28, 2012. The earlier extensions were enacted in P.L. 107-128, January 16, 2002 (which amended IIRIRA to direct that the program be terminated after six years); P.L. 108-156, December 3, 2003 (which amended IIRIRA to direct that the program be terminated after 11 years); P.L. 110-329, September 30, 2008 (which effectively established a March 6, 2009, termination date); P.L. 111-6, March 6, 2009 (which effectively established a March 11, 2009, termination date); P.L. 111-8, March 11, 2009 (which established a September 30, 2009, termination date); P.L. 111-68, October 1, 2009 (which effectively established an October 31, 2009, termination date), and P.L. 111-83, October 28, 2009 (which established a September 30, 2012, termination date).

SSA records confirm citizenship, the employer is notified that the employee's work authorization is verified. If the information submitted by the employer about a self-identified citizen matches the information in Numident but SSA records cannot confirm citizenship, the information is automatically checked against USCIS naturalization databases. If this check confirms citizenship, the employer is notified that the employee's work authorization is verified. If the employer-submitted information about a new hire does not match information in Numident, the employer is notified that the employee has received an SSA tentative nonconfirmation finding.

In cases in which the employer-submitted information matches SSA records but the individual self-identifies as a noncitizen, the information is sent electronically to USCIS for verification of work authorization. If the USCIS electronic check confirms work authorization, the employer is so notified. If the electronic check does not confirm work authorization, an Immigration Status Verifier (ISV) at USCIS checks additional databases. If the ISV is unable to confirm work authorization, the employer is notified that the employee has received a USCIS tentative nonconfirmation finding.

Employers are required to notify their employees about SSA and USCIS tentative nonconfirmation findings. If an employee chooses to contest a tentative nonconfirmation finding, the employer must refer the case to SSA or USCIS, as appropriate, and provide the employee with a referral letter. The employee has eight federal government work days from the referral date to contact the appropriate agency to resolve the issue. If an employee does not contest the finding within that period or the contest is unsuccessful, the system issues a final nonconfirmation.

Growth and Participation

E-Verify has been growing in recent years. On January 31, 2006, there were 5,272 employers enrolled in the program, representing 22,710 hiring sites. Three years later, on January 10, 2009, there were 103,038 employers enrolled, representing 414,110 hiring sites. On February 16, 2013, there were 432,256 employers enrolled in E-Verify, representing 1,300,871 hiring sites.[12] Based on the number of firms in the United States according to 2010 U.S. Census Bureau data,[13] these participant employers represented about 8% of U.S. employers.

As the number of enrolled employers has grown, so has the number of employer queries, or cases, handled by E-Verify. Between FY2007 and FY2012, the number of E-Verify queries increased more than sixfold, from 3.3 million to 21.1 million.[14] For comparison purposes, there were about 52 million nonfarm hires in the United States in calendar year 2012, according to Bureau of Labor Statistics data.[15]

[12] E-Verify enrollment data were provided to CRS by USCIS.

[13] According to U.S. Census Bureau Statistics of U.S. Businesses (SUSB) annual data, there were 5,734,538 firms in the United States in 2010. A firm is defined as "a business organization consisting of one or more domestic establishments in the same state and industry that were specified under common ownership or control." SUSB data and definitions are available at http://www.census.gov/econ/susb/.

[14] FY2007 query data are from Statement of Theresa C. Bertucci, USCIS, at U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration Policy and Enforcement, *E-Verify—Preserving Jobs for American Workers*, hearing, 112th Cong., 1st sess., February 10, 2011, p. 1, judiciary.house.gov/hearings/pdf/Bertucci%2002102011.pdf (hereinafter cited as USCIS hearing testimony, February 2011); FY2012 query data were provided to CRS by USCIS, December 18, 2012.

[15] U.S. Department of Labor, Bureau of Labor Statistics, "Job Openings and Labor Turnover—January 2013," news (continued...)

As mentioned, E-Verify is a primarily voluntary program. Under IIRIRA, however, violators of INA prohibitions on unlawful employment or those who engage in unfair immigration-related employment practices may be required to participate in a pilot program. IIRIRA also states that each department of the federal government and each Member of Congress, each officer of Congress, and the head of each legislative branch agency "shall elect to participate in a pilot program."[16] In August 2007, the Office of Management and Budget (OMB) issued a memorandum requiring all federal departments and agencies to begin verifying their new hires through E-Verify as of October 1, 2007.[17] In addition, federal regulations that went into effect in 2008 and 2009 included new E-Verify participation requirements, as discussed below.

Funding

USCIS, which administers E-Verify, is a fee-supported agency. Until FY2007, funding for the Basic Pilot program came from unrelated USCIS fees. (As discussed below, employers are not charged a fee to participate in E-Verify.) In recent years, however, Congress has appropriated funding for E-Verify.[18] Congress appropriated $100.0 million for E-Verify for FY2009, $137.0 million for FY2010, and $103.4 million for FY2011.[19] For FY2012, the Consolidated Appropriations Act, 2012, included $102.4 million for E-Verify.[20]

Recent Proposals on Electronic Employment Verification

Although the unauthorized alien resident population has declined in size since its high point of an estimated 12 million in 2007, it remains substantial. According to estimates by DHS, unauthorized alien residents in the United States numbered about 11.5 million in 2011.[21] The Pew Hispanic Center has estimated that there were 11.2 million unauthorized residents in 2010, of which some 8 million were in the civilian labor force that year.[22] Policymakers have considered an expansion of electronic employment verification—whether though E-Verify or a new system—as a key option for addressing unauthorized employment.

(...continued)

release, March 12, 2013, http://www.bls.gov/news.release/pdf/jolts.pdf.

[16] IIRIRA §402(e). These IIRIRA provisions have never been amended to reflect the fact that only one pilot program remains in operation. The federal department provisions further state that the secretary of each department may limit pilot program participation to hiring in certain states or geographic areas and to specified divisions within the department.

[17] U.S. Office of Management of Budget, "Verifying the Employment Eligibility of Federal Employees," Memorandum for the Heads of Departments and Agencies, August 10, 2007.

[18] See CRS Report R40642, *Homeland Security Department: FY2010 Appropriations*, coordinated by Jennifer E. Lake.

[19] P.L. 110-329, September 30, 2008 (FY2009); P.L. 111-83, October 28, 2009 (FY2010); P.L. 112-10, April 15, 2011 (FY2011).

[20] P.L. 112-74, December 23, 2011.

[21] U.S. Department of Homeland Security, Office of Immigration Statistics, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, by Michael Hoefer, Nancy Rytina, and Bryan C. Baker, March 2012.

[22] Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, Pew Hispanic Center, February 1, 2011, p. 17 (hereinafter cited as Pew, *Unauthorized Immigrant Population 2010*).

Legislation in Recent Congresses

In the 109th Congress, both the House and Senate passed major immigration bills (H.R. 4437 and S. 2611, respectively) that included significant and different electronic employment eligibility verification provisions. These bills were never reconciled.[23] In the 110th Congress, the Consolidated Appropriations Act, 2008, [24] included limited language on E-Verify, but no major electronic employment eligibility provisions were enacted.[25] In the 111th Congress, as discussed, a series of E-Verify extensions was enacted, culminating in the enactment of a provision in the Department of Homeland Security Appropriations Act, 2010, to authorize the program until September 30, 2012.[26]

Bills related to electronic employment eligibility verification were introduced in the 112th Congress. These bills would have variously made E-Verify permanent, made E-Verify mandatory for all employers or a subset of employers, permitted or required the verification of previously hired workers through E-Verify, and authorized a new electronic employment eligibility verification system. The 112th Congress did not enact any of these provisions, but it extended the existing E-Verify program until September 30, 2015, as part of P.L. 112-176. In addition, the Consolidated Appropriations Act, 2012, as enacted, included some limited language on E-Verify, prohibiting funds made available to federal agencies under the act to be expended on new hires who were not verified through E-Verify.[27]

Several bills on electronic employment eligibility verification have been introduced in the 113th Congress.[28] These bills would either reform E-Verify or authorize a new electronic employment eligibility verification system. The measures variously propose to make an electronic system permanent, to make an electronic system mandatory for all employers, to permit or require the electronic verification of previously hired workers, and to increase penalties related to unlawful employment.

E-Verify Regulations

Several federal rules that became effective in 2008 and 2009 require employers to participate in E-Verify in order to take advantage of certain opportunities. One of these rules implements an executive order issued by President George W. Bush in 2008 to require federal contractors to conduct electronic employment eligibility verification. The order read, in part:

> Executive departments and agencies that enter into contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the

[23] See archived CRS Report RL33125, *Immigration Legislation and Issues in the 109th Congress*, coordinated by Andorra Bruno.

[24] P.L. 110-161, December 26, 2007.

[25] See archived CRS Report RL34204, *Immigration Legislation and Issues in the 110th Congress*, coordinated by Andorra Bruno.

[26] P.L. 111-83, Title V, §547, October 28, 2009. See archived CRS Report RLR40848, Immigration Legislation and Issues in the 111th Congress, coordinated by Andorra Bruno.

[27] P.L. 112-74, December 23, 2011. See CRS Report R42036, *Immigration Legislation and Issues in the 112th Congress*, coordinated by Andorra Bruno.

[28] See, for example, S. 202, H.R. 478, and H.R. 502, as introduced in the 113th Congress.

> employment eligibility of: (i) all persons hired during the contract term by the contractor to perform employment duties within the United States; and (ii) all persons assigned by the contractor to perform work within the United States on the Federal contract.[29]

The Secretary of Homeland Security subsequently designated E-Verify as the required employment eligibility verification system for contractors.[30] The final rule to implement the executive order was published in November 2008.[31] It requires covered federal contracts to contain a new clause committing contractors to use E-Verify "to verify that all of the contractors' new hires, and all employees (existing and new) directly performing work under Federal contracts, are authorized to work in the United States."[32] After several delays, the rule became applicable on September 8, 2009.[33] At a February 13, 2013, hearing of the House Judiciary Committee's Subcommittee on Immigration and Border Security, USCIS reported that more than 50,000 federal contractors were enrolled in E-Verify.[34]

In addition, immigration regulations issued by the Bush Administration require employers to be users of E-Verify in order to be able to employ certain temporary residents (nonimmigrants).[35] In an interim final rule, effective April 8, 2008, DHS extended the maximum period of optional practical training (OPT) for foreign students on F-1 visas who have completed a science, technology, engineering, or mathematics degree. Under this rule, eligible F-1 students can extend their post-graduation OPT period, previously limited to 12 months, for 17 additional months, for a maximum OPT period of 29 months. In order to be eligible for this extension, however, the students must be employed by an employer that is enrolled in and is a participant in good standing in E-Verify.[36]

A DHS final rule on the H-2A temporary agricultural worker program, effective January 17, 2009, likewise requires employer participation in E-Verify as a condition of receiving an

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[29] Executive Order 13465, "Amending Executive Order 12989, as Amended," 73 *Federal Register* 33285-33287, June 11, 2008.

[30] U.S. Department of Homeland Security, "DHS Designates E-Verify as Employment Eligibility Verification System for All Federal Contractors," news release, June 9, 2008.

[31] U.S. Department of Defense, General Services Administration, National Aeronautics and Space Administration, "Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification," 73 *Federal Register* 67651-67705, November 14, 2008.

[32] Ibid., p. 67654. The rule requires inclusion of the E-Verify clause in prime federal contracts with a period of performance of at least 120 days and a value above the simplified acquisition threshold ($100,000), with some exemptions.

[33] The rule originally had an effective date of January 15, 2009, but both the effective date of the rule and the applicability date of the rule, on or after which contracting officers would include the new E-Verify clause in relevant contracts, were subsequently changed. The final amendment changed the applicability date to September 8, 2009. U.S. Department of Defense, General Services Administration, National Aeronautics and Space Administration, "Federal Acquisition Regulation; FAR Case 2007-013, Employment Eligibility Verification," 74 *Federal Register* 26981, June 5, 2009.

[34] Statement of Soraya Correa, USCIS, at U.S. Congress, House Committee on the Judiciary, *How E-Verify Works and How It Benefits American Employers and Workers*, February 27, 2013, http://judiciary.house.gov/hearings/113th/02272013/Correa%2002272013.pdf (hereinafter cited as USCIS hearing testimony, February 2013).

[35] Nonimmigrants are foreign nationals who are admitted to the United States for a designated period of time and a specific purpose. See CRS Report RL31381, *U.S. Immigration Policy on Temporary Admissions*, by Ruth Ellen Wasem.

[36] U.S. Department of Homeland Security, "Extending Period of Optional Practical Training by 17 Months for F-1 Nonimmigrant Students With STEM Degrees and Expanding Cap-Gap Relief for All F-1 Students With Pending H-1B Petitions," 73 *Federal Register* 18944-18956, April 8, 2008; 8 C.F.R. 214.2(f)(10)(ii)(C).

employment authorization benefit. Under the rule, an H-2A worker who is waiting for an extension of H-2A status based on a petition filed by a new employer can begin working for that new employer before the extension is approved, if the new employer is enrolled in and is a participant in good standing in E-Verify. If the new employer is not an E-Verify participant, the worker would not be authorized to begin working for the new employer until the extension of stay application is approved.[37]

Policy Considerations

The 113th Congress may consider bills to make changes to E-Verify or to authorize a new electronic employment eligibility verification system. A common element in many recent proposals is to require all employers to conduct electronic employment eligibility verification, whether through E-Verify or another system. In weighing any electronic employment verification legislation that may emerge in the 113th Congress, policymakers may want to take the following related issues into account.

Unauthorized Employment

The primary goal of an employment eligibility verification system is to ensure that individuals holding jobs are authorized to work in the United States. Independent studies of E-Verify, conducted for INS and DHS over the years by Westat and Temple University's Institute for Survey Research, have evaluated whether the system has reduced unauthorized employment and met other policy goals.[38]

The 2009 Westat study of E-Verify found that in the April 2008-June 2008 period, 3.1% of new hires received final nonconfirmations (i.e., final findings that the workers' employment authorization could not be confirmed). Westat has determined that most individuals receiving final nonconfirmation are, in fact, not authorized to work. Thus, if and when workers receiving final nonconfirmations are terminated, unauthorized employment would decrease. The extent of this decrease would depend, in part, on whether these workers were able to find other employment and if so, how long it took them to do so. It may be that E-Verify further helps reduce unauthorized employment by deterring unauthorized workers from applying for positions with employers that participate in E-Verify.

The effectiveness of E-Verify in reducing unauthorized employment through either final nonconfirmation findings or by discouraging applications, however, is limited by the size of the program relative to overall employment. Its effectiveness is also limited by its inability to detect

[37] U.S. Department of Homeland Security, "Changes to Requirements Affecting H-2A Nonimmigrants," 73 *Federal Register* 76891-76914, December 18, 2008; 8 C.F.R. 274a.12(b)(21). For information on the H-2A visa program, see CRS Report R42434, *Immigration of Temporary Lower-Skilled Workers: Current Policy and Related Issues*, by Andorra Bruno.

[38] The evaluation reports are: Institute for Survey Research, Temple University, and Westat, *INS Basic Pilot Evaluation Summary Report*, January 29, 2002; Institute for Survey Research, Temple University, and Westat, *Findings of the Basic Pilot Program Evaluation*, June 2002 (hereinafter cited as Basic Pilot Evaluation Report, June 2002); Westat, *Interim Findings of the Web-Based Basic Pilot Evaluation*, December 2006; Westat, *Findings of the Web Basic Pilot Evaluation*, September 2007 (hereinafter cited as Westat Report, September 2007); and Westat Report, December 2009. The 2009 Westat report is available on the USCIS website, http://www.uscis.gov. Selected E-Verify statistics are also available on the USCIS website.

various forms of fraud. Under E-Verify, the information on the I-9 form is checked against information in SSA and DHS databases. The system is able to detect certain types of document fraud, such as when a new hire presents counterfeit documents containing information about a non-work authorized or nonexistent person. As discussed in the next section, however, E-Verify has limited ability to detect other types of document fraud and identity fraud.

In the future, the authors of the 2009 Westat report posit, E-Verify may indirectly deter unauthorized employment by increasing the cost of securing that employment. According to the report, as unauthorized workers become more knowledgeable about E-Verify, they will increasingly obtain counterfeit, borrowed, or stolen documents with information about work-authorized persons, or will use fraudulent breeder documents, such as birth certificates, to obtain "legitimate" ones. The authors speculate that the perceived need for more sophisticated forms of fraud, with more expensive price tags, may have the long-term effect of reducing unauthorized employment:

> As it becomes harder to obtain fraudulent documents that will not be detected by E-Verify, the cost of such documents will presumably increase. Therefore, an important deterrent value of the Program ultimately may be to increase the cost of obtaining unauthorized employment, which, in turn, would cause some reduction in unauthorized employment; however, the amount of such reduction cannot be easily determined.[39]

Another possible outcome, if E-Verify makes it too difficult for unauthorized aliens to obtain legitimate employment, is that they may end up working under the table, thereby increasing the risks of worker exploitation. An opinion piece on Reason Online, affiliated with *Reason* magazine, made this argument:

> In the end, E-verify will not "turn off the tap," "dry up the pool of jobs," or "turn off the magnet." It will simply encourage workers underground, where they will be more vulnerable to abuse and less likely to pay taxes.[40]

Verification System Accuracy, Efficiency, and Capacity

In order for an electronic employment eligibility verification system to reduce unauthorized employment, as discussed in the preceding section, and not deprive legal workers of job opportunities, it must respond to queries correctly—that is, it must confirm the employment eligibility of individuals who are, in fact, authorized to work and not confirm the employment eligibility of individuals who lack work authorization. To be most effective, the system also must be efficient. IIRIRA required that the confirmation system, intended to be used as part of all three of the original pilot programs, be designed and operated to, among other things, maximize its reliability.[41]

Accuracy of Findings

The independent evaluations of E-Verify conducted by Westat and the Institute for Survey Research have analyzed the accuracy of the system using a variable known as the *erroneous*

[39] Westat Report, December 2009, p. 133.

[40] Kerry Howley, "Walls of Paper," April 21, 2008, http://www.reason.com.

[41] IIRIRA §404(d)(1).

tentative nonconfirmation (TNC) rate for ever-authorized employees. This error rate, which can be calculated from available data, is defined as the percentage of individuals ultimately verified through the system that initially receives a tentative nonconfirmation finding. The erroneous TNC rate for ever-authorized employees was 4.8% for the first two years of the Basic Pilot Program (November 1997-December 1999 period); that is, 4.8% of the workers who were ultimately found to be work authorized first received a tentative nonconfirmation.[42] The erroneous TNC rate has decreased significantly since the late 1990s, amounting to 0.5% for the third quarter of FY2008 (April 2008-June 2008).[43] According to USCIS, a new Westat evaluation finds that the erroneous TNC rate for the third quarter of FY2010 (April 2010-June 2010) was 0.3%.[44] As explained below in the "Discrimination" section, however, error rates vary for different groups, with foreign-born citizens having the highest rate and U.S.-born citizens having the lowest rate.

There are important limitations to the erroneous TNC rate as a measurement of error, however. The variable does not take into account work-authorized individuals who receive tentative nonconfirmations but who, for whatever reason, do not contest them; these individuals are not classified as "ever-authorized." In addition, the data used to calculate the erroneous TNC rate include individuals who are found to have work authorization by the system, but who are *not*, in fact, work authorized. Eliminating these false positives (used here to refer to findings that unauthorized workers are work-eligible) from the calculation would change the error rate. Thus, as explained in the 2009 Westat report:

> [T]he erroneous TNC rate is an imperfect measure of program success because it underestimates the inaccuracy rate for authorized workers and because it is not possible to produce an estimate of an analogous inaccuracy rate for non-employment-authorized workers.[45]

As part of its 2009 evaluation of E-Verify, Westat developed new measures of inaccuracy to more fully assess the system's performance. These new inaccuracy rates are estimates of the consistency of E-Verify findings with actual work authorization status. The *inaccuracy rate for authorized workers* is an estimate of the percentage of work-authorized workers *not* initially found to be authorized to work through E-Verify. For the period from April 2008 to June 2008, the inaccuracy rate for authorized workers was approximately 0.8%, meaning that less than 1% of authorized workers were initially found by the system to lack work authorization.

Analogously, the *inaccuracy rate for unauthorized workers* is an estimate of the percentage of workers without work authorization that is initially and incorrectly found to be employment authorized through E-Verify. For the April 2008-June 2008 period, the inaccuracy rate for unauthorized workers was approximately 54%, meaning that about half of the unauthorized workers checked through E-Verify were incorrectly found to be authorized to work. The *total inaccuracy rate* is an estimate of the percentage of all workers checked through E-Verify who receive inaccurate initial work authorization findings. For the April 2008-June 2008 period, E-

[42] Westat Report, September 2007, p. 57.

[43] Westat Report, December 2009, p. 117.

[44] Telephone conversation with USCIS Verification Division, March 5, 2013. According to USCIS, the new Westat report should be available in 2013.

[45] Westat Report, December 2009, p. 116.

Verify's total inaccuracy rate was approximately 4.1%, meaning that 4.1% of workers received initial E-Verify findings that were inconsistent with their actual work authorization status.[46]

There are several key reasons for the inconsistencies between E-Verify findings and actual work authorization status. Inaccurate findings for authorized workers are due mainly to data input errors and inaccurate or out-of-date federal government records. For unauthorized workers, incorrect work authorization findings are due mainly to fraud—both document fraud, in which employees present counterfeit or invalid documents or fraudulently obtained "valid" documents, and identity fraud, in which employees present valid documents issued to other individuals. The 2009 Westat report cited identity fraud as a chief source of inaccurate work authorization findings for unauthorized workers. While, as noted, E-Verify can detect certain types of document fraud, it has limited ability to detect such fraud when the "counterfeit documents are of reasonable quality and contain information about actual work-authorized persons who resemble the worker providing the documentation."[47] Valid documents obtained by using fraudulent birth certificates or other breeder documents are also difficult for E-Verify to detect. According to the 2009 Westat report:

> E-Verify will only detect this type of fraud if the person obtains the "valid" document using information about a fictitious person or alters the data about a real person that the E-Verify system checks, such as date of birth.[48]

As noted, fraud could increase in response to an expanded electronic verification system. Some observers, like Jim Harper of the Cato Institute, are particularly concerned about the potential for increased identity fraud if E-Verify were to become mandatory for all employers. In written testimony for a 2007 House hearing on employment verification and worksite enforcement, Harper took the position that expanding E-Verify would increase identity fraud. He argued that to gain approval under a nationwide electronic system, unauthorized workers would seek "documents with genuine, but rarely used, name/SSN combinations," which would "increase illicit trade in Americans' Social Security numbers."[49]

Initiatives to Improve Accuracy

USCIS has made changes to E-Verify in the past few years to address the sources of inaccuracy for both authorized and unauthorized workers. One set of changes aims to reduce inaccuracies for authorized workers due to data input errors and incorrect federal government records. Since September 2007, in cases where an initial electronic check of SSA or USCIS records indicates a mismatch, the system automatically prompts the employer to double check the data in a query and make any corrections before E-Verify issues an SSA TNC or refers a case to an USCIS Immigration Status Verifier for additional database checks.[50] A December 2009 addition "enables

[46] Ibid., pp. 116-117. The total inaccuracy rate is much closer to the inaccuracy rate for authorized workers than to the inaccuracy rate for unauthorized workers because the overwhelming majority of workers in the labor force and checked through E-Verify are authorized to work.

[47] Ibid., p. 131.

[48] Ibid., p. 131.

[49] Statement of Jim Harper, in U.S. Congress, House Committee on the Judiciary, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, *Proposals for Improving the Electronic Employment Verification and Worksite Enforcement System*, hearing, 110th Cong., 1st sess., April 26, 2007 (Washington, DC: GPO, 2007), p. 79 (hereinafter cited as Harper Testimony, April 2007).

[50] Statement of Michael Aytes, USCIS Acting Deputy Director, at U.S. Congress, House Committee on Appropriations, (continued...)

E-Verify to recognize European date format and common clerical errors of transposed visa and passport numbers."[51]

Other enhancements involve inclusion of additional databases in the E-Verify process that are automatically checked, as appropriate, before a tentative nonconfirmation is issued. In a May 2008 change, which is known as Naturalization Phase I and is described above as part of the standard verification process, USCIS naturalization databases are automatically checked in cases in which SSA records cannot confirm citizenship for a self-identified citizen.[52] This change seeks to reduce the number of tentative nonconfirmations issued to naturalized citizens whose SSA records have not been updated to reflect their citizenship status.[53] In February 2009, Department of State passport records were incorporated into the E-Verify program. These records are checked when a self-identified citizen presents a U.S. passport to establish identity and employment eligibility as part of the I-9 process and DHS or SSA cannot immediately confirm work eligibility.[54] In addition, in May 2008, real time arrival data for noncitizens from the Integrated Border Inspection System was added to the system.[55] In October 2012, access to another database—DHS's Arrival and Departure Information System (ADIS) database—was added to E-Verify. These enhancements are intended to reduce mismatches for recent arrivals.

Another initiative, known as E-Verify Self-Check and implemented on a pilot basis in March 2011,[56] enables individuals to voluntarily check their work authorization status online through E-Verify to determine whether there are any mismatches between the information they enter and the information in SSA or DHS databases that need to be corrected. E-Verify Self-Check became available nationwide in February 2012.[57]

To reduce inaccuracies for unauthorized workers, USCIS launched a Photo Screening Tool in September 2007 to improve E-Verify's ability to detect a certain type of identity fraud. The Photo Tool comes into play if a new hire presents an Employment Authorization Document (EAD), a Permanent Resident Card (green card), or a U.S. Passport[58] to establish employment

(...continued)

Subcommittee on Homeland Security, *Priorities Enforcing Immigration Law*, hearing, 111th Cong., 1st sess., April 2, 2009, p. 2 (hereinafter cited as USCIS hearing testimony, April 2009).

[51] U.S. Government Accountability Office, *Employment Verification: Federal Agencies Have Taken Steps to Improve E-Verify, but Significant Challenges Remain*, GAO-11-146, December 2010, p. 18 (hereinafter cited as GAO, *Employment Verification*).

[52] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS Announces Enhancements to E-Verify Program," news release, May 5, 2008 (hereinafter cited as USCIS news release, May 2008).

[53] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, *Westat Evaluation of the E-Verify Program: USCIS Synopsis of Key Findings and Program Implications*, January 28, 2010, p. 10 (hereinafter cited as USCIS Synopsis of Westat Report). Prior to implementation of Naturalization Phase I, if SSA records were unable to confirm citizenship for a self-identified citizen, SSA would issue a tentative nonconfirmation finding.

[54] U.S. Department of Homeland Security, U.S. Citizenship and Immigration Services, "USCIS Adds Passport Data in E-Verify Process for Foreign-Born Citizens," news release, March 4, 2009 (hereinafter cited as USCIS news release, March 2009).

[55] USCIS news release, May 2008.

[56] Beginning on March 21, 2011, E-Verify Self-Check was made available to residents of five states (Arizona, Colorado, Idaho, Mississippi, and Virginia) and Washington, DC.

[57] Additional information about E-Verify Self-Check is available at http://www.uscis.gov/selfcheck.

[58] U.S. Passport and U.S. Passport Card photographs were added to the Photo Tool in September 2010. USCIS hearing testimony, February 2011, p. 6.

authorization. In such cases, the employer checks the photo on the document provided by the new hire against the image stored in USCIS databases. This tool enables detection of legitimately issued documents that have been altered by photo-substitution. The effectiveness of the Photo Tool, however, is greatly limited by the fact that new hires do not have to show either an EAD, a green card, or a U.S. Passport; they can opt to show other documents to evidence identity and employment eligibility.[59] According to USCIS, approximately 15% of all E-Verify cases in FY2012 used the Photo Tool.[60]

Another feature to reduce inaccurate findings for unauthorized workers, known as Records and Information from DMVs for E-Verify (RIDE), was launched in June 2011. RIDE seeks to detect document fraud in cases in which a new hire presents a driver's license or state-issued identification card to establish identity as part of the I-9 process. In cases in which a new hire presents a driver's license or state-issued identification card from a participating state, RIDE enables E-Verify to compare the information on the document against state records. Mississippi became DHS's first partner in this effort in June 2011. Florida joined RIDE in December 2012.

A USCIS official discussed other E-Verify initiatives for combating identity fraud at a February 2013 House hearing:

> USCIS is developing other methods for reducing fraud in E-Verify, such as monitoring Social Security numbers (SSNs) that are used repeatedly, evaluating other identity assurance techniques like those used in E-Verify's Self Check, and developing an enhancement to allow employees to lock their SSNs in E-Verify so they cannot be used by others..[61]

Database Accuracy

An accurate verification system requires accurate underlying data. Data inaccuracies can be a source of false positives (i.e., findings that unauthorized workers are work-eligible) as well as false negatives (i.e., findings that authorized workers are not work-eligible). In establishing the Basic Pilot program and the other pilots, IIRIRA directed SSA and the former INS to maintain accurate records.[62]

The 2002 evaluation of the Basic Pilot Program found that there were "serious problems with the timeliness and accuracy of the INS database."[63] The 2007 Westat evaluation reported progress on this front, but indicated additional improvements were needed:

> The accuracy of the USCIS database used for verification has improved substantially since the start of the Basic Pilot program. However, further improvements are needed, especially if the Web Basic Pilot becomes a mandated national program—improvements that USCIS personnel report are currently underway. Most importantly, the database used for verification

[59] The 2009 Westat report recommended that USCIS discontinue use of the Photo Tool "until progress can be made on expanding it to include a broader range of documents, including documents that are less tamper-proof and counterfeit-resistant than are the documents currently in the Photo Screening Tool." Westat Report, December 2009, p. 244. USCIS rejected this recommendation, arguing that the Photo Tool was essential to its efforts to combat identity fraud. USCIS Synopsis of Westat Report, p. 8.

[60] USCIS hearing testimony, February 2013.

[61] USCIS hearing testimony, February 2013.

[62] IIRIRA §404(g).

[63] Basic Pilot Evaluation Report, June 2002, p. 143.

> is still not sufficiently up to date to meet the IIRIRA requirement for accurate verification, especially for naturalized citizens.[64]

The 2009 Westat evaluation reported continued improvement in database accuracy, stating that "the accuracy of the USCIS database, as measured by the erroneous TNC rate for workers ever found authorized, has improved considerably." (Initiatives to improve E-Verify's accuracy and reduce the erroneous TNC rate are discussed above.) As discussed below in the "Discrimination" section, Westat further found in its latest report that differences between the erroneous TNC rate for different groups (including for U.S.-born citizens and naturalized citizens) had narrowed, although it also noted that the rate for naturalized citizens "remains well above the rate for U.S.-born workers."[65]

The accuracy of SSA's Numident database was the subject of a report issued by the SSA Inspector General in December 2006.[66] Prompted by a congressional request, this review examined the accuracy of the Numident fields relied on by E-Verify. The report found Numident to be "generally accurate," but also "identified some discrepancies" that could result in employers receiving incorrect information in the employment eligibility verification process. More specifically, the SSA Inspector General estimated that "discrepancies in approximately 17.8 million (4.1 percent) of the 435 million Numident records could result in incorrect feedback when submitted through Basic Pilot." The report noted particular concern about the "extent of incorrect citizenship information" in Numident for foreign-born U.S. citizens and noncitizens.[67]

System Efficiency

The efficiency of an employment eligibility verification system, like its accuracy, is multidimensional. One measure of efficiency used in the independent evaluations of E-Verify is the percentage of employees verified automatically or after initial review by a USCIS Immigration Status Verifier—without a tentative nonconfirmation being issued (see *Verification Process*, above). In the June 2004-March 2007 period, 93% of cases were verified automatically or after initial ISV review. In April 2008-June 2008, 96% of cases were verified automatically or after initial ISV review. According to USCIS, in FY2012, 98.65% of cases were verified automatically.[68]

At the same time, employer groups and advocates for immigrants and low-income families maintain that E-Verify is not efficient. In opposing legislative efforts to require certain employers to use E-Verify, groups have argued that such mandatory participation would result in increased bureaucracy and hiring delays.[69]

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[64] Westat Report, September 2007, p. xxi.

[65] Westat Report, December 2009, p. 233.

[66] Social Security Administration, Office of the Inspector General, *Accuracy of the Social Security Administration's Numident File*, Congressional Response Report, A-08-06-26100, December 2006, http://www.ssa.gov.

[67] Ibid., p. ii.

[68] USCIS E-Verify "Statistics and Reports" web page, available at http://www.uscis.gov, visited March 13, 2013.

[69] See, for example, Richard Kaplan, "Senate Excludes E-Verify Check on Illegal Immigrant Workers from Stimulus Package," February 10, 2009, http://www.hispanicbusiness.com; Friends Committee on National Legislation, "Strip E-Verify from the Final Stimulus Package," February 11, 2009, http://www.fncl.org.

System Capacity

The capacity of an electronic employment eligibility verification system to handle queries about most or all newly hired workers in the United States has arisen as an issue in light of proposals to expand electronic verification or make it mandatory for all employers. In FY2012, as noted, E-Verify received 21.1 million queries. In 2011 congressional testimony, a USCIS official reported on E-Verify's capacity to handle an expanded workload: "E-Verify currently has the capacity to receive at least 60 million electronic queries annually if all new hires were run through the E-Verify program."[70]

A 2010 Government Accountability Office (GAO) report further cited information from E-Verify program officials that USCIS had tested the E-Verify system in 2007 and determined that it could process 240 million queries annually.[71]

Discrimination

At the time of IRCA's enactment, there was widespread concern that the new INA §274A provisions would result in employment discrimination against foreign-looking or foreign-sounding work-authorized individuals as, for example, employers opted not to hire them for fear that they lacked work authorization or treated them differently than other work-authorized job applicants or workers.[72] To partly address these types of concerns, IRCA added a new §274B to the INA to make it an unfair immigration-related employment practice to discriminate against an individual, other than an unauthorized alien, in hiring, recruitment or referral for a fee, or termination because of the individual's national origin or the individual's citizenship or permanent immigration status. IRCA, as originally enacted, also directed GAO to report to Congress on the implementation and enforcement of §274A to determine, among other things, if "a pattern of discrimination has resulted" against U.S. citizens or other work-eligible jobseekers.[73] In 1990, GAO reported that widespread discrimination had occurred as a result of IRCA.[74] Congress, however, took no action on these findings.

One goal of the IIRIRA employment eligibility verification pilot programs was to reduce the type of discrimination associated with the I-9 process. To that end, the law required that the confirmation system, intended to be used as part of all three of the original pilot programs, be designed and operated

> to have reasonable safeguards against the system's resulting in unlawful discriminatory practices based on national origin or citizenship status, including (A) the selective or unauthorized use of the system to verify eligibility; (B) the use of the system prior to an offer

[70] USCIS hearing testimony, February 2011, p. 10.

[71] GAO, *Employment Verification*, p. 44. According to the report, 240 million queries per year is the "higher estimate of the number of queries expected to be generated by a mandatory E-Verify program."

[72] Employment discrimination is defined here, as in the 2009 Westat report, as "differential treatment based on individual characteristics, such as race or gender, that are unrelated to productivity or performance." Westat Report, December 2009, p. GL-2.

[73] INA §274A(j), eliminated by IIRIRA §412(c).

[74] U.S. General Accounting Office, *Immigration Reform: Employer Sanctions and the Question of Discrimination*, GAO/GGD-90-62, March 1990. Note: At the time of the 1990 report, GAO was the General Accounting Office. It is now the Government Accountability Office.

> of employment; or (C) the exclusion of certain individuals from consideration for employment as a result of a perceived likelihood that additional verification will be required, beyond what is required for most job applicants.[75]

These enumerated behaviors are prohibited under the E-Verify system. However, as discussed in the employer compliance section below, evaluations have found that some employers nevertheless practice them.

The potential impact of the IIRIRA pilot programs on employment discrimination was the subject of much debate during congressional consideration of the legislation. Some stakeholders maintained that the availability of electronic verification could make employers more likely to hire foreign-born individuals, thus reducing discrimination. On the other hand, immigrant advocates expressed concerns that discrimination would increase, even if employers followed proper pilot program procedures. They argued, for example, that work-authorized foreign-born individuals would be more likely than their U.S.-born counterparts to receive tentative nonconfirmations and, thus, to be subject to the inconveniences and other negative consequences that these findings may entail.

Evaluations of E-Verify have found evidence to support both of these predictions. According to the 2009 Westat study, most E-Verify employers reported that using the system had no effect on their willingness to hire foreign-born workers. Among those reporting an effect, the percentage of users who indicated that the system made them more willing to hire immigrant workers was substantially greater than the percentage who indicated that it made them less likely to do so. Based on these findings, the Westat report stated, "it is reasonable to conclude that the net effect of the change is an increase in employers' willingness to hire foreign-born workers."[76]

At the same time, evaluations of E-Verify have consistently found that work-authorized foreign-born workers are more likely than U.S.-born workers to receive erroneous tentative nonconfirmations (initial findings that an individual's work authorization cannot be confirmed). Based on this increased likelihood of receiving an erroneous TNC, the 2009 Westat report stated that "E-Verify contributes to post-hiring discrimination against foreign-born workers."[77] The report discussed some of the impacts on workers of receiving a TNC, such as missed work time to contest the finding and associated financial costs. In addition, according to the report, some work-authorized employees who receive TNCs may quit their jobs. In cases in which employers do not follow proper procedures, a TNC may result in a worker being fired.

The issue of differential rates of erroneous tentative nonconfirmation findings for different groups is a major concern for immigrant advocates and certain other interested parties. As noted, the overall TNC rate for workers ultimately authorized by E-Verify for the third quarter of FY2008 (April 2008-June 2008) was 0.5%. The erroneous TNC rate varied considerably by group, however. The 2009 Westat study found that between April 2008 and June 2008, 0.1% of U.S.-born citizens who were ultimately verified through the system first received a tentative nonconfirmation. As shown in the last column of **Table 1**, erroneous TNC rates were considerably higher for work-authorized foreign-born individuals, particularly naturalized U.S. citizens, during these months. For the April 2008-June 2008 period, the gap in the erroneous TNC rate between

[75] IIRIRA §404(d)(4).

[76] Westat Report, December 2009, p. 206.

[77] Ibid., p. 235.

U.S.-born citizens and other work-authorized individuals was 2.5 percentage points in the case of foreign-born individuals (U.S. citizens and noncitizens), 3.1 percentage points in the case of naturalized citizens, and 2.0 percentage points in the case of noncitizens.[78]

Although still significant, differences between the erroneous TNC rates for U.S.-born citizens and other work-authorized groups have decreased over time. While the magnitude of the differences has fluctuated from year to year, the overall trend has been downward. By way of illustration, **Table 1** shows erroneous TNC rates by group for an earlier period, January 2006-March 2006. Between January 2006-March 2006 and April 2008-June 2008, the difference in the erroneous TNC rates between U.S.-born workers and foreign-born workers overall narrowed from 4.1 percentage points to 2.5 percentage points, the difference between U.S.-born citizens and foreign-born U.S. citizens narrowed from 6.9 percentage points to 3.1 percentage points, and the difference between U.S.-born citizens and noncitizens narrowed from 2.7 percentage points to 2.0 percentage points.[79]

Table 1. E-Verify Erroneous Tentative Nonconfirmation Rates by Citizenship and Immigration Status

	January-March 2006	April-June 2008
U.S.-Born Citizens	0.2%	0.1%
Foreign-Born Individuals	4.3%	2.6%
Foreign-Born Citizens	7.1%	3.2%
Noncitizens	2.9%	2.1%

Source: CRS presentation of data in Westat, *Findings of the E-Verify Program Evaluation*, December 2009.

Historically, the relatively high erroneous TNC rate for naturalized citizens has been due mainly to SSA records not reflecting the fact that noncitizens have naturalized. The Naturalization Phase I initiative, as described above, was launched in May 2008 to address this problem and is credited by Westat with bringing about "a dramatic reduction in the erroneous TNC rate for foreign-born citizens."[80] The incorporation of Department of State passport data into E-Verify did not begin until 2009 and thus its effects are not reflected in the 2008 data discussed here. In a March 2009 news release, however, USCIS reported that the addition of passport data was "already reducing the incidences of mismatches among foreign-born citizens."[81] In a related effort to correct erroneous TNCs issued to naturalized citizens, USCIS implemented the Naturalization Phase II initiative in May 2008 to give naturalized citizens who receive a tentative nonconfirmation the option of telephoning USCIS, rather than visiting an SSA field office, to resolve the issue.[82]

[78] These differences are calculated by subtracting the erroneous TNC rate for U.S.-born citizens from the erroneous TNC rate for each of the other groups.

[79] For each period, these differences are calculated by subtracting the erroneous TNC rate for U.S.-born citizens from the erroneous TNC rate for each of the other groups.

[80] Westat Report, December 2009, p. 239. The Westat report also described an "unintended consequence" of this initiative in increasing the percentage of unauthorized workers who were found work authorized. These workers were committing identity fraud by using the identity of naturalized citizens.

[81] USCIS news release, March 2009.

[82] USCIS news release, May 2008.

Employer Compliance

Employer compliance in the context of E-Verify refers to employers' properly following the program's policies and procedures, which include submitting an E-Verify query to verify a new hire's employment eligibility within three days after the hire date, providing written notice to employees of tentative nonconfirmation findings, and not taking adverse actions against employees who choose to contest tentative nonconfirmation findings. Employer compliance helps strengthen E-Verify, while employer noncompliance can reduce the effectiveness of the program in curtailing unauthorized employment and can result in discrimination. In the interest of preventing discrimination, as mentioned above, certain employer behaviors are prohibited by law. These include the selective use of the system to verify employment eligibility and the use of the system to prescreen job applicants.

The 2009 evaluation found that employer compliance with the various E-Verify requirements was "generally much higher than noncompliance." In a notable example, the data analyzed by Westat supported the idea that employers were not selectively submitting queries only for citizens or noncitizens. The discussion of employer compliance in the Westat report, however, focused mainly on "noncompliant behaviors of interest."[83] Based on self-reported information from employers, supplemented by information from worker interviews, record reviews, and other sources, the evaluation identified a range of prohibited behaviors that employers were engaging in, including the following:

- Some employers did not follow procedures with respect to training employees on the E-Verify system.
- Some employers used E-Verify to screen job applicants.
- Some employers used E-Verify for existing employees.
- Some employers did not notify employees of tentative nonconfirmation findings at all or did not provide written notification of TNCs.
- There was evidence that a small number of employers discouraged employees with tentative nonconfirmations from contesting the findings.
- Some employers took prohibited adverse actions against employees while they were contesting tentative nonconfirmation findings. These actions included restricting work assignments, delaying training, or reducing pay.
- Some employers did not always follow the legal requirement to promptly terminate the employment of employees receiving final nonconfirmation findings.[84]

A key issue to consider with respect to employer compliance is the extent to which requiring employers to participate in E-Verify or another electronic employment eligibility verification system, as under some proposals in the 113th and earlier Congresses, could affect compliance. It seems plausible that, for a variety of reasons, mandatory participants as a whole may have lower levels of compliance than voluntary users.

[83] Westat Report, December 2009, p. 147.

[84] Ibid., p. 147-160.

Privacy

Employee privacy was another issue considered in the development of the original IIRIRA pilot programs. Among the IIRIRA requirements for the confirmation system was that the system be designed and operated "with appropriate ... safeguards to prevent unauthorized disclosure of personal information."[85]

The 2009 Westat report stated that SSA and USCIS had taken steps to protect worker privacy in connection with E-Verify. It explained that both agencies had policies to ensure the security of the databases used in E-Verify. According to the report, all employers participating in E-Verify must sign a memorandum of understanding and are only given access to the cases they submit.

The 2009 report also noted some potential privacy-related weaknesses of E-Verify. Among them is a concern that individuals could improperly use E-Verify to obtain information about others. While it cited this possibility, however, the Westat report stated that "there are no reported cases of either nonlegitimate employers enrolling in the Program or employers using it to verify for purposes other than determining employment-authorization status."[86] Another potential weakness involves employers not informing workers that they have received TNCs in private settings. In surveys conducted as part of the 2007 and 2009 Westat evaluations of E-Verify, over 90 percent of surveyed employers reported that they consistently informed workers of TNCs in private. Worker surveys conducted as part of the 2009 evaluation yielded different findings, with about a quarter of the surveyed workers who commented on the subject indicating that they were not notified of a TNC in a private area.[87]

Proposals to expand E-Verify, particularly proposals to make the system mandatory for all employers, have heightened the concerns of some interested parties about employee privacy. In his 2007 House testimony, Jim Harper of the Cato Institute argued that a nationwide electronic employment verification system would have serious privacy consequences. He drew sharp distinctions between a paper-based I-9 system, in which employee information "remains practically obscure," and a web-based electronic system, in which the entered information is very easy for the participating agencies to access, copy, and use. In Harper's view:

> Unless a clear, strong, and verifiable data destruction policy is in place, any electronic employment verification system will be a surveillance system, however benign in its inception, that observes all American workers. The system will add to the data stores throughout the federal government that continually amass information about the lives, livelihoods, activities, and interests of everyone—especially law-abiding citizens.[88]

The American Civil Liberties Union likewise expressed concerns about the threats to privacy posed by a mandatory E-Verify system, in a statement submitted to the House Judiciary Committee at the time of the committee's E-Verify hearing in February 2013:

[85] IIRIRA §404(d)(3).

[86] Westat Report, December 2009, p. 236.

[87] Ibid., p. 202.

[88] Harper Testimony, April 2007, p. 82.

> Nationwide, E-Verify would create a virtual national ID and would lay the groundwork for a possible biometric national ID system, thereby imposing significant privacy and civil liberties costs on all Americans, including lawful workers, businesses, and taxpayers.[89]

System Usability and Employer Burden

Another of the IIRIRA requirements for the pilot program confirmation system was that it be designed and operated to maximize its ease of use by employers.[90] According to the 2009 Westat evaluation, most employers found E-Verify to be an effective and accurate tool that was not burdensome. For some employers, however, there was a perceived burden. In response to a 2008 employer survey conducted in connection with the 2009 evaluation, 24% of employers who had enrolled in E-Verify but who had either not used it or stopped using it said that they had decided the system "would be too burdensome to use."[91]

Employers are not charged a fee by the government to participate in E-Verify, but they may incur set-up costs (such as, for training and computer hardware) and operating costs (such as, for wages for verification staff and computer maintenance). According to the 2009 Westat report, 74% of employers surveyed indicated that they incurred no direct set-up costs. The median total cost for those reporting direct set-up costs was $100, although 10% of this group indicated that they spent at least $1,000. Similarly, with respect to operating costs, 77% of survey respondents reported no direct maintenance costs. The median annual cost for those reporting direct maintenance costs was $400, although 10% of those surveyed indicated that they spent at least $5,000.[92]

If E-Verify becomes a mandatory program, the percentage of employers in the higher-cost group may grow. Employers that do not currently have the personnel or hardware to conduct electronic verifications could find required participation particularly burdensome.

Conclusion

The policy issues discussed here may be especially important to consider in the context of proposals to require most or all employers to participate in E-Verify or another electronic employment eligibility verification system. A mandatory system could arguably make it possible to identify many more unauthorized workers. At the same time, under such a system, any inaccuracies, inefficiencies, or privacy breaches that occurred could affect much larger numbers of employees and employers. Employer compliance under a mandatory system would seem to be a salient issue, especially since it has direct implications for other issues, notably discrimination. Employer burden may be another important consideration. It may be that a mandatory system would require new strategies to address these issues.

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[89] Written statement of the American Civil Liberties Union, for a hearing by U.S. Congress, House Committee on the Judiciary, How E-Verify Works and How It Benefits American Employers and Workers, February 27, 2013, http://www.aclu.org/files/assets/aclu_statement_mandatory_everify_house_hearing_022713_final.pdf. (The ACLU did not testify at the hearing.)

[90] IIRIRA §404(d)(1).

[91] Westat Report, December 2009, p. 84.

[92] Ibid., pp. 182-183.

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